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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

ELOQUI VOICE SYSTEMS, LLC,

Case No. 2:17-cv-00890-JAK-SS

Plaintiff,

v.

NUANCE COMMUNICATIONS,
INC., a Massachusetts corporation,

Defendant.

**DEFENDANT NUANCE
COMMUNICATIONS, INC.'S
NOTICE OF MOTION AND
MOTION UNDER *DAUBERT* TO
EXCLUDE EXPERT TESTIMONY
OF DR. ERIC FRUITS;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: October 22, 2018
Time: 8:30 a.m.
Courtroom: 10B, First Street Courthouse

Hon. John A. Kronstadt

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT, on October 22, 2018 at 8:30 a.m., or as soon thereafter as the matter may be heard in Courtroom 10B at the United States Courthouse, 350 West First Street, Los Angeles, CA 90012, before the Honorable John H. Kronstadt, Defendant Nuance Communications, Inc. (“Nuance” or “Defendant”) will and hereby move the Court for an order striking the expert report of Dr. Eric Fruits, and precluding Dr. Fruits from testifying at trial or otherwise in this matter.

The motion is based on this Notice of Motion and Motion, the supporting Memorandum of Points and Authorities, all other pleadings, papers and evidence on file in this matter, and any such matters as the Court may consider at the time of the hearing on this motion.

This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on August 8, 2018.

Dated: August 15, 2018

HOGAN LOVELLS US LLP

By: /s/ Christian E. Mammen

Christian E. Mammen (Bar No. 188454)

Attorneys for Defendant

NUANCE COMMUNICATIONS, INC.

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant Nuance Communications, Inc. (“Nuance”) respectfully moves the Court, pursuant to Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), to exclude the testimony of Plaintiff’s damages expert, Dr. Eric Fruits, including the Expert Report of Eric Fruits, Ph.D. (“Fruits Report”). *See* Declaration of Christian E. Mammen in Support of Defendant’s Motion to Exclude Testimony of Dr. Eric Fruits (“Mammen Decl.”), Exh. A.

I. INTRODUCTION

In this action, Plaintiff Eloqui Voice Systems, LLC (“Eloqui”) has accused Nuance of infringing one asserted claim of each of three now-expired patents.¹ The sole accused product for all three patents is Nuance’s NINA virtual assistant (“NINA”). Mammen Decl. Exh. A (Fruits Report ¶ 24).

On May 21, 2018, Eloqui served its opening expert reports, including the Fruits Report. Dr. Fruits purported to opine on reasonable royalty damages for infringement of the patents-in-suit. Without taking into account revenues, profits, or even features of the accused product itself, Dr. Fruits based his entire royalty analysis on revenue figures for the *entire Enterprise Division* of Nuance.

Indeed, throughout his report, Dr. Fruits relied upon methodology long rejected by the Federal Circuit. He compared the entire Enterprise Division's average profit margin for the four year period before and the six year period after NINA was released, and calculated an average 2% increase from the earlier period to the later period. Then, without considering any of the multiple factors that impact year-to-year division-level revenue, he assumed that half of the division's average profit increase was attributable to improved gross margins, assumed that half of the improved gross margins were attributable to the accused product, and

¹ The patents-in-suit all expired on May 1, 2018. See U.S. Patent Nos. 6,144,938; 6,334,103; 7,058,577.

1 assumed that these accused-product-related improvements in the gross margins
 2 should be split 50/50 between Eloqui and Nuance. All told, Dr. Fruits calculated
 3 that Eloqui was therefore entitled to 0.25% of the gross revenue of Nuance's
 4 Enterprise Division over a six-year period. Multiplied by the \$2.14 billion he
 5 calculated as the Enterprise Division's gross revenue as the royalty base, Dr. Fruits
 6 arrived at a royalty calculation of \$5.4 million. To summarize:

7	Start with the total gross revenue for Nuance's <i>entire Enterprise Division</i> , over a six year period.	\$2.14 billion
10	Compare the <i>average profit margin</i> of Enterprise Division Revenue for the <i>four</i> years before (2009-2012) and the <i>six</i> years after (2013-2018) the launch of NINA.	Before: 26.3% After: 28.3% Difference: 2.0%
14	Calculate the amount of post-NINA increased profits by multiplying the gross revenue by the increased average profit margin for the entire Enterprise Division.	\$2.14 billion x 2% = \$42.8 million
18	<i>Assume half</i> of the increased profits are attributable to increased gross margins.	\$42.8 million x 50% = \$21.4 million
20	<i>Assume half</i> of the increased gross margins are attributable to "products subject to the Patents- in-Suit"	\$21.4 million x 50% =\$10.7 million
23	<i>Assume</i> the portion attributable to the patents- in-suit is <i>split evenly</i> between Eloqui and Nuance	\$10.7 million x 50% = \$5.4 million

26 This is nothing more than the long-discredited 25% Rule of Thumb, layered
 27 on top of a number of other untenable assumptions.

28 Dr. Fruits also conducted an alternative calculation using an "analytical

1 approach,” which was based on a 2012 KPMG study concerning statistical
 2 correlations between the 25% Rule of Thumb and actual royalty rate data across a
 3 variety of industries. Not only is the entire idea of using the KPMG study
 4 discredited since the Federal Circuit rejected the 25% Rule of Thumb, but Dr. Fruits
 5 did not even apply the KPMG study’s preferred statistical analysis, resulting in a
 6 650% overstatement of his proposed royalty rate.

7 Every step of his analysis is defective, deficient, and must be stricken and
 8 excluded.

9 Moreover, Dr. Fruits’ report falls so far below the standard of acceptable
 10 damages expert analysis that he should not be given any opportunity to submit a
 11 supplemental report. This is even more true, given the extraordinary amount of
 12 additional time Eloqui was given to submit its opening expert reports. Reports
 13 were initially due on January 8, 2018. D.N. 25 (6/12/17 Minute Order following
 14 Scheduling Conference). Eloqui missed that deadline. *See* D.N. 88 (Opposition to
 15 Plaintiff’s Motion to Extend and Amend at pp. 4-8). The Court then vacated the
 16 expert report schedule, and later set a May 21, 2018 deadline for opening expert
 17 reports – more than four and a half months after the initial deadline. D.N. 154
 18 (May 2, 2018 Claim Construction Order at pp. 9-10). In other words, Eloqui had
 19 more than enough time to come up with a credible damages theory. Put simply, it
 20 failed. *See ePlus, Inc. v. Lawson Software, Inc.*, 700 F.3d 509, 522-523 (Fed. Cir.
 21 2012) (affirming preclusion of patentee from introducing evidence of an alternative
 22 royalty rate as a discovery sanction for not timely presenting the alternative theory).

23 **II. LEGAL STANDARDS**

24 Federal Rule of Evidence 702 provides that expert testimony may be
 25 admitted only if it is “(1) based upon sufficient facts or data, (2) the product of
 26 reliable principles and methods, and (3) the witness has applied the principles and
 27 methods reliably to the facts of the case.” Expert testimony that fails to meet these
 28 criteria must be excluded. *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292

1 (Fed. Cir. 2011); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

2 Every trial court acts as a “gatekeeper” before admitting expert testimony at
 3 trial. *Micro Chem., Inc. v. Lextron, Inc.*, 317 F.3d 1387, 1391-1392 (Fed. Cir.
 4 2003); *Welogix, Inc. v. Accenture, L.L.P.*, 716 F.3d 867, 881 (5th Cir. 2013).

5 In *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), the Supreme Court
 6 clarified that the district court’s gatekeeper role is not limited to an evaluation of
 7 the reliability of the methods used by an expert, but extends to a review of the
 8 strength of the connection between an expert’s conclusion and the facts on which
 9 that conclusion is based. The Court observed that “[t]rained experts commonly
 10 extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules
 11 of Evidence requires a district court to admit opinion evidence that is connected to
 12 existing data only by the *ipse dixit* of the expert.” *Id.* at 146. As a result, “[a] court
 13 may conclude that there is simply too great an analytical gap between the data and
 14 the opinion proffered,” and in such cases the expert’s testimony is unreliable and
 15 should be excluded. *Id.* “[O]ne major determinant of whether an expert should be
 16 excluded under *Daubert* is whether he has justified the application of a general
 17 theory to the facts of the case.” *Uniloc*, 632 F.3d at 1316.

18 Where expert testimony is challenged, the proponent of expert testimony
 19 must establish its admissibility by a preponderance of the evidence. *Bourjaily v.*
 20 *United States*, 483 U.S. 171, 175-176 (1987). The district court acts as the
 21 gatekeeper and “must be assured that the proffered witness is qualified to testify”
 22 before admitting expert testimony at trial. *Welogix*, 716 F.3d at 881 (citation and
 23 internal quotation omitted). Although vigorous cross-examination and presentation
 24 of contrary evidence are the traditional and appropriate means of attacking shaky
 25 evidence, that evidence must first be adjudged to be admissible. *Id.*

26 To be admissible, expert testimony opining on a reasonable royalty must
 27 “sufficiently [tie the expert testimony on damages] to the facts of the case. If the
 28 patentee fails to tie the theory to the facts of the case, the testimony must be

1 excluded.” *Exmark Mfg. Co. Inc. v. Briggs & Stratton Power Products Group,*
 2 *LLC.*, 879 F.3d 1332, 1349-1351 (Fed. Cir. 2018) (citing *Uniloc USA, Inc. v.*
 3 *Microsoft Corp.*, 632 F.3d 1292, 1315 (Fed. Cir. 2011)). “When an expert employs
 4 the *Georgia-Pacific* factors, reciting each factor and making a conclusory remark
 5 about its impact on the damages calculation before moving on does no more than
 6 tell the jury what factors a damages analysis could take into consideration.” *Id.*

7 III. ARGUMENT

8 A. Dr. Fruits Improperly Bases His Opinion on Gross Revenue for 9 the *Entire Enterprise Division* of Nuance.

10 As a general rule, the royalty base in a reasonable royalty calculation must be
 11 the “smallest salable [patent practicing] unit.” *Power Integrations, Inc. v. Fairchild*
 12 *Semiconductor Int’l, Inc.*, 894 F.3d 1258, 1270 (Fed. Cir. 2018) (“where multi-
 13 component products are accused of infringement, the royalty base should not be
 14 larger than the smallest salable unit embodying the patented invention”). The
 15 “entire market value rule” (EMVR) is an exception to this general rule. EMVR
 16 allows for the inclusion of non-patented components in a patent damages award
 17 when the patented component is *the* basis for consumer demand for the entire
 18 device. *Lucent Techs. v. Gateway, Inc.*, 580 F.3d 1301, 1336 (Fed. Cir. 2009)
 19 (internal citations omitted) (emphasis added); *see also Rite-Hite Corp. v. Kelley*
 20 *Co.*, 56 F.3d 1538, 1549 (Fed. Cir. 1995) (*en banc*); *Info-Hold, Inc. v. Muzak LLC*,
 21 783 F.3d 1365, 1371 (Fed. Cir. 2015) (affirming exclusion of patentee’s damages
 22 expert testimony since the expert applied the EMV rule without showing that the
 23 patented features drove the demand and also applied the 25% Rule of Thumb).
 24 *Virnetx, Inc. v. Cisco Systems, Inc.*, 767 F.3d 1308, 1328-1329 (Fed. Cir. 2014)
 25 (damages expert testimony should have been excluded because it relied on entire
 26 market value rule).

27 The Federal Circuit has very recently reiterated the importance of strictly
 28 following the EMVR. *Power Integrations*, 894 F.3d at 1270-1271 (“[S]trict

1 requirements limiting the entire market value exception ensure that a reasonable
 2 royalty does not overreach and encompass components not covered by the patent.”
 3 (citations omitted)). As the Federal Circuit noted in *Uniloc*, use of overall product
 4 revenues in damages calculations “cannot help but skew the damages horizon for
 5 the jury, regardless of the contribution of the patented component to this revenue.”
 6 *Uniloc*, 632 F.3d at 1320. Here, by relying on the revenue of the entire Enterprise
 7 Division, Dr. Fruits has dramatically overreached, by not only including
 8 *components* not covered by the patent, but by including entire (unknown and
 9 unarticulated) *products and product lines* that are not covered by the patent. Such
 10 an approach would inevitably and impermissibly skew the damages horizon
 11 significantly upwards.

12 **B. Dr. Fruits Used Arbitrary “Before” and “After” Multi-Year
 13 Average Profit Margin Data**

14 By arbitrarily selecting a multi-year average profit margin for comparison,
 15 Dr. Fruits has masked the considerable year-to-year variability of the profits from
 16 Nuance’s Enterprise Division. Moreover, although Dr. Fruits relies on Nuance’s
 17 10-K forms for his multi-year average calculations, he also ignores the explanations
 18 for year-to-year changes in those profits that were provided in those same 10-K
 19 reports. For example, Nuance’s 2013 10-K showed that profits from 2012 to 2013
 20 actually decreased, and that the decrease was “driven primarily by lower product
 21 and licensing revenue in Europe and higher selling expenses.” (Mammen Decl.
 22 Exh. D (2013 Nuance Form 10-K at p. 31)). Similarly, the profit margin during
 23 that period also decreased, due primarily to “higher sales and marketing expenses”
 24 but offset somewhat by “cost-savings measures during the period.” *Id.* Nuance’s
 25 10-Ks from later years also indicate causes for profit improvement other than
 26 For example, in its Form 10-K for 2016 Nuance stated, “The increase in segment
 27 [Enterprise] profit margin was **primarily driven by our cost savings and process**
 28 **optimization initiatives.**” Mammen Decl. Exh. E (2016 Nuance Form 10-K at p.

1 31 (emphasis added)). Nuance further indicated that its 2016 “improvement in
 2 gross margin [was] **due to improved operational efficiencies within our**
 3 **professional services and hosting services.**” *Id.* (emphasis added). Similarly
 4 detailed explanations were provided in Nuance’s 2017 Form 10-K. Mammen Decl.
 5 Exh. F (2017 Nuance Form 10-K at pp. 30-31). These statements contradict Dr.
 6 Fruits’ assumption that the alleged average improvement in Enterprise segment
 7 profits was attributable to its alleged use of the patents starting in 2013.

8 Additionally, Dr. Fruits’ own analysis shows that Nuance’s annual profit
 9 margins were considerably more variable and volatile than his “before-and-after”
 10 average calculations reflect. For example, under Dr. Fruits’ own analysis, the
 11 Enterprise segment earned revenue of approximately \$296 million in both 2010 and
 12 2011. However, Nuance earned a profit margin of 27.8% in 2010 but a profit
 13 margin of only 21.4% in 2011. Mammen Decl. Exh. A (Fruits Report Exh. 3).
 14 Since both years are from before the alleged start of infringement, factors other than
 15 the alleged infringement must be responsible for the change in profit margin for the
 16 Enterprise segment. Similarly, the profit margin for the Enterprise segment for
 17 fiscal years 2013, 2014 and 2015, the three years following the start of the alleged
 18 infringement, were *lower* than the profit margin for the Enterprise segment in fiscal
 19 year 2012, the last year before the alleged infringement began. Overall, four of the
 20 six time periods analyzed after the start of the alleged infringement earned *lower*
 21 profit margins than fiscal year 2012. The 2.0% increase in average profit margin is
 22 primarily driven by two factors: (1) the relatively low margin earned in fiscal year
 23 2011 of 21.4%, which was “driven by decreased volume and revenue from one on-
 24 demand customer,” Mammen Decl. Exh. C (2011 Nuance Form 10-K at p. 36) and
 25 (2) the relatively high margin earned in fiscal year 2016 of 33.5%, which “was
 26 primarily driven by our [Nuance] cost savings and process optimization initiatives.”
 27 Mammen Decl. Exh. E (2016 Nuance Form 10-K at p. 31).

28 In sum, Dr. Fruits’ own analysis demonstrates the illogical assumption that

1 any change in profit margins can simply be assigned to the patents-in-suit without
 2 further analysis and support.

3 **C. Dr. Fruits' Three Separate 50% Allocations Are Each Arbitrary**

4 To cap it off, Dr. Fruits makes not one, not two, but three separate
 5 assumptions about 50/50 allocations – that half of the profits are due to improved
 6 gross margins, that half of the improved gross margins are due to the launch of the
 7 accused product, and that half of that amount should be given to Eloqui. He
 8 doesn't explain the basis for any of these 50/50 allocations. Any one of the
 9 undefended, unexplained and unsupported 50/50 assumptions would be enough to
 10 exclude Dr. Fruits' report. *See Virnetx*, 767 F.3d at 1327; *LaserDynamics, Inc. v.*
 11 *Quanta Computer, Inc.*, 694 F.3d 51, 69 (Fed. Cir. 2012) (one-third apportionment
 12 rejected as lacking sufficient economic support; damages expert also improperly
 13 based damages assessment on overall selling price of laptop computer, where
 14 patented feature was just one component of an optical disk drive; ... “echoes the
 15 kind of arbitrariness of the ‘25% Rule’ that we recently and emphatically rejected
 16 from damages experts.”); *Limelight Networks, Inc. v. XO Comm’ns, LLC*, No. 3:15-
 17 CV-720-JAG, 2018 WL 678245, *2-4 (E.D. Va. Feb. 2, 2018) (excluding
 18 patentee’s damages expert testimony because it failed to tie the facts of the case to
 19 determination how the parties would have split the revenues from the accused
 20 products); *Koninklijke Phillips Elecs. N.V. v. Zoll Lifecor Corp.*, No. 12-1369, 2017
 21 WL 3140798, *4 (W.D. Pa. July 25, 2017) (striking portion of patentee’s damages
 22 expert report that opined for a 50% apportionment because it failed to tie that figure
 23 to any of the facts of the case); *Biscotti Inc. v. Microsoft Corp.*, No. 2:13-CV-
 24 01015-JRG-RSP, 2017 WL 2536962, at *5 (E.D.Tex. May 18, 2017) (striking
 25 expert testimony of a 60/40 split of the profits as “entirely conclusory”); *Good*
 26 *Corp. v. Mobileiron, Inc.*, No. 5:12-CV-05826-PSG, 2015 WL 4090431, *1-*6
 27 (N.D. Cal. July 5, 2015) (striking patentee’s damages expert testimony for not
 28 properly apportioning the patented features from the unpatented features and

1 improperly using a 50/50 split without showing how that split was tied to the facts
 2 of the case). *See also NetAirus Techs. LLC v. Apple, Inc.*, No. 10-cv-3257-JAK,
 3 2017 WL 11237200, *5-*6 (N.D. Cal., Oct. 23, 2013) (excluding expert damages
 4 opinion starting with a 50% assumption not tied to the facts of the case).

5 **D. Dr. Fruits' Application of the *Georgia-Pacific* Factors is Flawed
 6 and Incomplete.**

7 In a scant six pages of analysis that is untethered to the rest of the analysis in
 8 his report, Dr. Fruits recites the *Georgia-Pacific*² factors and flags some topics that
 9 might be germane to certain of the factors. But he neither explains his analysis, nor
 10 explains how the factors impact his overall damages calculation. Taken together,
 11 his analysis of each factor is shockingly thin, and wholly deficient.

12 As a starting point, the *Georgia-Pacific* analysis requires a royalty rate as a
 13 baseline, followed by an explanation as to how each factor tends to increase or
 14 decrease that baseline rate. When the expert's report fails to provide a starting
 15 point, it should be stricken. *Baltimore Aircoil Co., Inc. v. SPX Cooling Techs. Inc.*,
 16 No. CCB-13-2053, 2016 WL 4426681, at *27 (D.Md. Aug. 22, 2016) ("Without a
 17 relevant starting point, a *Georgia-Pacific* analysis is not a reasonable methodology"
 18 and should be excluded under *Daubert* and Rule 702).

19 **1. Factor 1: The royalties received by the patentee for the
 20 asserted patent's licensing, which pay prove an established
 21 royalty**

22 Dr. Fruits provides one three-sentence paragraph of analysis under Factor 1.
 23 He acknowledges that Eloqui has not licensed the patents-in-suit. Mammen Decl.
 24 Exh. A (Fruits Report ¶ 35). He then acknowledges that Intellectual Ventures did
 25 include the patents "in a portfolio of patents that were available for licensing." *Id.*

27 ² *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y.
 28 1970).

1 This is clearly a reference to the Intellectual Ventures licenses that this Court
 2 considered—and required to be submitted to the Court—in connection with
 3 Nuance’s motion to dismiss for lack of standing, which the Court converted to a
 4 motion for summary judgment via a January 30, 2018 Order. D.N. 87. In response
 5 to that Order, Eloqui filed copies of over 100 purported Intellectual Ventures
 6 license agreements with the Court. *See* D.N. 94 - D.N. 121 (Declaration of Chris
 7 Henkens and Exhibits thereto). However, Dr. Fruits says *nothing* about these
 8 Intellectual Ventures licenses—not how many there were, not what their terms
 9 nor whether they are comparable licenses, not how many patents were covered by
 10 them. Nothing.

11 He offers no explanation as to how this factor impacts his analysis. His
 12 analysis of Factor 1 should be excluded and he should be precluded from testifying
 13 about this factor.

14 **2. Factor 2: The rates paid by the accused infringer for the use
 15 of other patents comparable to the asserted patent**

16 For Factor 2, Dr. Fruits identifies the existence of four old patent licenses
 17 (dated between 1995 and 2007), and one more recent litigation settlement (dated
 18 2014). However, he makes no effort to evaluate the comparability of any of them.
 19 Mammen Decl. Exh. A (Fruits Report ¶¶ 36-38). In fact, the only substantive term
 20 he identifies is that in one instance Nuance paid \$217,189 for a worldwide,
 21 exclusive license. Mammen Decl. Exh. A (Fruits Report ¶ 37 (bullet 2)). *See*
 22 *LaserDynamics*, 694 F.3d at 80-81 (license agreements relied on were untethered to
 23 patented technology); *NetAirus*, 2013 WL 11237200 at *7 (“patent plaintiff has the
 24 burden to prove that the licenses were sufficiently comparable to support its
 25 damages theory” (citation and internal quotation marks omitted)).

26 He offers no further elaboration, and no explanation as to how this factor
 27 impacts his analysis. His analysis of Factor 2 should be excluded and he should be
 28 precluded from testifying about this factor.

3. Factor 3: The nature and scope of the license

For Factor 3, Dr. Fruits states his assumption that the license would be a worldwide, nonexclusive license, which “conveys no special economic benefit beyond ability to practice the patented technology.” Mammen Decl. Exh. A (Fruits Report ¶ 40). Dr. Fruits offers no explanation or analysis of his assumption. Moreover, he offers no reasons why the parties would enter into a *worldwide* license for three (expired) U.S. patents. The Supreme Court has clearly held that “[i]t is the general rule under United States patent law that no infringement occurs when a patented product is made and sold in another country.” *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 441 (2007). Furthermore, “[t]he presumption that the United States law governs domestically but does not rule the world applies with particular force in patent law.” *Id.* at 444-445. Indeed, the Patent Act expressly includes a territorial limitation, providing that “whoever without authority makes, uses, offers to sell, or sells any patented invention, *within the United States*, or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.” 35 U.S.C. § 271(a) (emphasis added). Dr. Fruits has offered no basis and no explanation for his assumption that the hypothetical license would be a *worldwide* license or that it should be valued on that basis.

He offers no elaboration, and no explanation as to how this factor impacts his analysis. His analysis of Factor 3 should be excluded and he should be precluded from testifying about this factor.

4. Factor 4: The patent holder's licensing policy and marketing program

24 Dr. Fruits' analysis of Factor 4 is, again, limited to three sentences. He
25 asserts that Eloqui "has a policy of enforcing the Patents-in-Suit" and that "the
26 economic terms of a license would be important to Eloqui." Mammen Decl. Exh. A
27 (Fruits Report ¶ 42). Moreover, as noted under Factor 1, he acknowledges that
28 Eloqui has *not* licensed the Patents-in-Suit. Mammen Decl. Exh. A (Fruits Report

1 35).

2 He offers no elaboration, and no explanation as to how this factor impacts his
 3 analysis. His analysis of Factor 4 should be excluded and he should be precluded
 4 from testifying about this factor.

5 **5. Factor 5: The commercial relationship between the parties**

6 For Factor 5, Dr. Fruits offers five paragraphs, totaling nine sentences.
 7 Mammen Decl. Exh. A (Fruits Report ¶¶ 43-47). His analysis acknowledges that
 8 the parties are not competitors, that Eloqui does not manufacture or sell any
 9 products or services, and that Eloqui's only revenues depend on patent licensing.
 10 He then asserts that "Eloqui could and would insist in [sic] receiving all of the
 11 economic benefit of its technology. It would *not be willing to split* this benefit with
 12 any licensee." Mammen Decl. Exh. A (Fruits Report ¶ 47 (emphasis added)). This
 13 is in direct conflict with his assumption later in the report that "the gains (i.e.,
 14 increased profits) are *evenly split* between Eloqui and Nuance." Mammen Decl.
 15 Exh. A (Fruits Report ¶ 70 (bullet 4) (emphasis added)).

16 Moreover, again, he offers no explanation or analysis, and does not state how
 17 this factor implicates his calculations. Dr. Fruits' analysis of Factor 5 should be
 18 excluded and he should be precluded from testifying about this factor.

19 **6. Factor 6: The effect and value of selling patented items in
 20 promoting sales of the licensee's non-patented products**

21 For Factor 6, Dr. Fruits makes unsupported assertions that the accused
 22 product's use of the patented technology "drives consumer demand for the product"
 23 and "allows for 'synergy across multiple channels.'" Mammen Decl. Exh. A
 24 (Fruits Report ¶¶ 49-50).

25 This would have been where Dr. Fruits should have explained and defended
 26 his reliance on his uber-EMVR theory of reliance on the entire Enterprise Division
 27 revenue. Clearly, Dr. Fruits' unsupported *ipse dixit* is not enough to meet the
 28 "strict requirements" for application of the EMVR. *Power Integrations*, 894 F.3d

1 at 1270-1271. His analysis of Factor 6 should be excluded and he should be
 2 precluded from testifying about this factor.

3 **7. Factor 7: The duration of the asserted patent and license
 4 term**

5 For Factor 7, Dr. Fruits identifies two considerations: the patents expired on
 6 May 1, 2018, and the proposed license would be a nonexclusive license. Mammen
 7 Decl. Exh. A (Fruits Report ¶¶ 52-53). He does not explain how these
 8 considerations impact his analysis (though presumably both factors would tend to
 9 reduce any proposed royalty rate). His analysis of Factor 7 should be excluded and
 10 he should be precluded from testifying about this factor.

11 **8. Factor 8: The patent holder's commercial success in making
 12 a profit for products made under the patent and their
 13 current popularity**

14 Dr. Fruits offers no analysis whatsoever concerning Factor 8. Mammen
 15 Decl. Exh. A (Fruits Report ¶ 54). As he acknowledges elsewhere, “Eloqui does
 16 not manufacture or sell any products or services” (Mammen Decl. Exh. A (Fruits
 17 Report ¶ 44)). Therefore, Eloqui *cannot* have experienced any commercial success,
 18 and this factor must also necessarily tend to reduce any proposed royalty rate. His
 19 analysis of Factor 8 should be excluded and he should be precluded from testifying
 20 about this factor.

21 **9. Factor 9: The utility and advantages of the patented
 22 invention compared to older models and devices**

23 For this factor, Dr. Fruits simply says “This factor is discussed in Section
 24 VII.” However, Section VII of his report, which is focused on Nuance and the
 25 accused product, says nothing about the advantages of the patents compared with
 26 older models and devices. Further, he offers no analysis or explanation about how
 27 the factor impacts his proposed royalty rate. His analysis of Factor 9 should be
 28 excluded and he should be precluded from testifying about this factor.

10. Factor 10: The nature of the patented invention

For this factor, Dr. Fruits simply says “This factor is discussed in Section VII.” However, Section VII of his report, which is focused on Nuance and the accused product, says nothing about the nature of the patented invention. Further, he offers no analysis or explanation about how the factor impacts his proposed royalty rate. His analysis of Factor 10 should be excluded and he should be precluded from testifying about this factor.

11. Factor 11: The extent to which the infringer has made use of the invention and the value of this use

For this factor, Dr. Fruits simply says “This factor is discussed in Section VII.” While Section VII does include some discussion of the accused product, it does not address either “the extent to which [Nuance] has made use of the [patented] invention” or of “the value of this use.” He offers no analysis or explanation about how the factor impacts his proposed royalty rate. His analysis of Factor 11 should be excluded and he should be precluded from testifying about this

factor. 12. Factor 12: The portion of profit or selling price customarily received for the invention's use

For Factor 12, strikingly, Dr. Fruits admits that “[t]here is no known customary splitting of profits and no economic justification for considering this factor in this matter.” Mammen Decl. Exh. A (Fruits Report ¶ 59).

Yet his calculation of reasonable royalties is based on just such a splitting of profits. He states an assumption that “the gains (i.e., increased profits) are evenly split between Eloqui and Nuance.” Mammen Decl. Exh. A (Fruits Report ¶ 70 (bullet 4)).

These directly contradictory statements cancel each other out—or at least cancel out Dr. Fruits' credibility to testify either way on this factor. His analysis of Factor 12 should be excluded and he should be precluded from testifying about this factor.

1 **13. Factor 13: The portion of realizable profits attributable to**
 2 **the invention**

3 For Factor 13, Dr. Fruits makes two striking statements. First, he admits “I
 4 am not aware of any information provided in discovery or publicly available
 5 indicating the portion of realizable profits Nuance attributes to Nina or the
 6 technology related to the Patents-in-Suit.” Mammen Decl. Exh. A (Fruits Report ¶
 7 61). This admission is remarkable in two respects. First, it is an admission that he
 8 has no basis for offering an opinion relating to this factor. Second, it mis-frames
 9 the profitability inquiry. Rather than what the inquiry should be (the portion of
 10 realizable profits *of the accused product* attributable to the *patented invention*), Dr.
 11 Fruits frames his inquiry erroneously and broadly (the portion of realizable profits
 12 *of the entire Enterprise Division* attributable to *the accused product*). This is just
 13 plain wrong.

14 Then, unencumbered by any such information he makes his own
 15 assumptions: “[I]t is assumed half of the increase in revenues [of the entire
 16 Enterprise Division] can be attributed to the technology embodied in the Patents-in-
 17 Suit.” Mammen Decl. Exh. A (Fruits Report ¶ 66). This conclusion is untethered
 18 to any facts or analysis. His analysis of Factor 13 should be excluded and he
 19 should be precluded from testifying about this factor.

20 **14. Factor 14: Expert opinion testimony**

21 Dr. Fruits offers no separate analysis for Factor 14. Mammen Decl. Exh. A
 22 (Fruits Report ¶ 67). Rather, he merely cross-references his report as a whole.
 23 Thus, he should be precluded from testifying about this factor for all of the reasons
 24 that he should be precluded from testifying about the rest of his report.

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1 **15. Factor 15: The amount that the patent owner and accused**
 2 **infringer would have agreed on at the time the infringement**
 3 **began if both had been reasonably and voluntarily trying to**
 4 **reach a license agreement**

5 For Factor 15, Dr. Fruits summarizes his conclusions, including each of the
 6 50/50 splits that figure into his calculations. Mammen Decl. Exh. A (Fruits Report
 7 ¶¶ 68-70). But he offers no explanation or analysis of any facts or evidence
 8 underlying his conclusions. This conclusory assessment of the outcome of the
 9 hypothetical negotiation is clearly insufficient under *Daubert* and Rule 702.

10 **E. Dr. Fruits' "Analytical Approach" Is Inappropriate**

11 As an alternative basis for his opinions, Dr. Fruits offers a calculation under
 12 what he calls an "analytical approach." Mammen Decl. Exh. A (Fruits Report ¶¶
 13 71-73). In this "analytical approach," Dr. Fruits relies on a 2012 report from
 14 KPMG, titled, "Profitability and royalty rates across industries: Some preliminary
 15 evidence" ("KPMG Study"). *See* Mammen Decl. Exh. B (KPMG Study); *see also*
 16 Mammen Decl. Exh. A (Fruits Report ¶ 71 n.10). The purpose of the KPMG Study
 17 was to assess the statistical validity of the "25 percent rule," across various
 18 technology sectors, and compared with various measures of profits (e.g., gross
 19 margins, EBIDTA or EBIT). Dr. Fruits' reliance on the KPMG Study for his
 20 "analytical" approach is improper for a number of reasons.

21 First, shortly before the KPMG Study was published, the Federal Circuit
 22 rejected the 25 percent rule as a basis for calculating royalties. *Uniloc*, 632 F.3d at
 23 1315 ("This court now holds as a matter of Federal Circuit law that the 25 percent
 24 rule of thumb is a fundamentally flawed tool for determining a baseline royalty rate
 25 in a hypothetical negotiation. Evidence relying on the 25 percent rule of thumb is
 26 thus inadmissible under *Daubert* and the Federal Rules of Evidence, because it fails
 27 to tie a reasonable royalty base to the facts of the case at issue."). Therefore, the
 28 entire premise of the study is no longer permissible under U.S. patent law.

1 Second, the correlations from the KPMG study that are relied on by
 2 Dr. Fruits have a very low r-squared value (0.328), indicating a low degree of
 3 reliability. An r-squared value represents, on a scale of 0 to 1, how well the theory
 4 explains the data set. A score of 0.328 means that the underlying data is only
 5 correlated to the data being analyzed.³ Particularly when considered in relation to
 6 the many other defects on Dr. Fruits’ “analytical approach,” such a low r-squared
 7 value (meaning a low correlation between the formula and the data *in the KPMG*
 8 *report*—not even the data about licenses relevant to the patents-in-suit or accused
 9 product here) falls far short of the threshold needed to survive Rule 702 and
 10 *Daubert*.

11 Third, even if the KPMG report presented a valid methodology (which it
 12 does not), Dr. Fruits has mis-applied the report, and used a formula that even the
 13 authors of the KPMG study rejected, resulting in an overstatement of a royalty rate
 14 by 650%. The formula shown in Dr. Fruits’ report (“Royalty Rate = 0.0108 +
 15 (0.34658 x EBIDTA)”) – starts with an “intercept,” or minimum royalty rate, of
 16 0.0108, then multiplies the EBIDTA margin by 0.34658. The constants used by Dr.
 17 Fruits are shown as the middle rows of Table 2 in the KPMG Report. However, the
 18 KPMG Report specifically rejects the calculations from Table 2, stating, “Since the
 19 intercepts in all of the regression equations are *statistically insignificant*, the
 20 regressions were re-run by setting the intercept items as zero. The results are
 21 reported in Table 3.” KPMG Report at 10. Re-running Dr. Fruits’ calculation
 22 using the data from Table 3 would result in a royalty rate of 0.206% (calculated as 0
 23 + (0.4117*0.005)). Compared with the 1.3% royalty rate that Dr. Fruits calculated
 24

25 ³ R-squared is a statistics term that represents how well a particular dependent
 26 variable explains what is being measured. Richard A. Wehmhoefer, *Statistics in*
Litigation 83 (Shepards/McGraw Hill, 1985). *See also, e.g.*,
<https://towardsdatascience.com/coefficient-of-determination-r-squared-explained-db32700d924e>. To the extent any evidentiary support concerning r-squared is
 27 required, it is a proper subject for judicial notice. Fed. R. Evid. 201.
 28

1 using his “analytical approach,” Dr. Fruits’ calculated rate is 650% higher. This
 2 0.206% rate is 1.08% lower than the rate Dr. Fruits calculated.

3 Fourth, rather than actually using Nuance’s actual EBIDTA margin for the
 4 accused products, Dr. Fruits simply substitutes in his “half-of-half-of-2%”
 5 assumption in place of the EBIDTA margin. He offers no explanation of, or defense
 6 for, this substitution. *See* Mammen Decl. Exh. A (Fruits Report ¶ 71).

7 Finally, Dr. Fruits makes no effort to explain whether NINA falls within any
 8 of the industries represented in the KPMG Report data.

9 Each of these failures is enough to reject and exclude Dr. Fruits’ “analytical
 10 approach.” The combination of the five is utterly fatal.

11 **F. Dr. Fruits’ Testimony Should Be Excluded Entirely, and He
 12 Should Not Be Permitted to Supplement His Expert Report.**

13 Eloqui should not be permitted, at this late stage of the proceedings, to
 14 amend or supplement Dr. Fruits’ report. This will very likely have the consequence
 15 that Eloqui is unable to present any evidence of damages at trial. *See ePlus, Inc.*,
 16 700 F.3d at 523. Such a result is fully within the Court’s discretion, and is a
 17 reasonable consequence for Eloqui’s submission of such a deficient report. Such a
 18 result is also consistent with the letter and spirit of this Court’s Standing Orders.
 19 D.N. 11 (Standing Orders for Civil Cases Assigned to Judge John A. Kronstadt) at
 20 33 (Initial Patent Order for Cases Assigned to Judge John A. Kronstadt, § 4.1).

21 **IV. CONCLUSION**

22 No part of the Expert Report of Dr. Fruits is defensible under *Daubert*. The
 23 report should be stricken in its entirety, and Dr. Fruits should not be permitted to
 24 testify concerning Eloqui’s claimed damages.

1 Dated: August 15, 2018

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